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Where is the Proper Balance? Public Access to Government Information in an Era of Concern over National Security

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Introduction

Thank you very much for inviting me to be with you today. I always enjoy an opportunity to escape the basement of the UNO Library to breathe fresh air and talk about government documents and government information. Honesty demands, however, that I immediately tell you that the title of my presentation, "Where is the Proper Balance?" is something of a bait-and-switch. If I truly knew the fulcrum for the proper balance, I would likely set up shop in a lucrative consulting business in Washington, DC. I understand that the demise of Jack Abramhoff's lobbying operations left some prime office space available on K Street.

My goal today is not to tell you precisely where the proper balance is, because that can only be worked out in democratic interplay among the Legislative, Executive, and Judicial branches of our governments. That process is awkward, halting, and sometimes maddening; but I continue to have great faith in the wisdom of our Founders, who perceived that checks and balances would over time prove a guarantor of our liberties. We must always remember that the Founders deliberately structured the Federal government so that it could never be **too** efficient. Recall that Benito Mussolini made great progress in making the trains run on time in Fascist Italy, but the tradeoff was, well...Fascist Italy.

So what is my goal today? I would like to provide a framework for thinking about the issues surrounding public access to government information in an era of concern over national security. I will review several real life examples drawn from situations that have been reported by the news media and that I know personally from my work as a Government Documents librarian. I certainly bring some bias to my understanding of these situations, arising both from my personal political predilections and my professional obligations, but I will strive to make my editorializing clear as such. I hope that my presentation today will leave you with some ideas to ponder and help you toward your own sense of where the proper balance lies. With this introduction, I'll move onto those real life examples....

Examples of Concern

The USGS Surface Water Resources CD-ROM

In the first few weeks after the 9/11 terrorist attacks of 2001, Federal, state, and local officials across the country worked in an extremely high state of alert, trying to plug gaps in security which terrorists could exploit. Staffers at the U.S. Geological Survey--who typically would have thought little or nothing about national security concerns--noted that a database documenting national surface water resources, which had been distributed to several hundred libraries across the country on a CD-ROM disk, contained information that could be sensitive. For example, one could identify the locations of intakes along the Missouri River which feed into Omaha's water supply. Could terrorists have used this information to introduce poisons into Omaha's water? The USGS requested that the U.S. Government Printing Office contact the libraries and instruct them to pull and destroy the CD-ROM. We had a copy at the UNO Library, and I destroyed it as I am obliged to do when the U.S. Government Printing Office requires it.

Several circumstances surrounding the USGS CD-ROM, however, left me questioning the need to destroy it: 1) much of the data had already been copied from the CD-ROM onto an Internet site used by researchers collaborating on surface water research, and the data dispersed widely from there. The cat was already long out-of-the-bag, so to speak; 2) anyone driving along John J. Pershing Drive and investigating the riverfront around N.P. Dodge Park in Omaha could easily find water intakes. Small boats also run up and down the riverfront, from which the intakes are even more visible. 3) Anyone who looked at a Rand-McNally Road Atlas would see a large city (Omaha) alongside a major river (the Missouri), and they could reasonably assume a municipal water system drawing from the river. Anyone wanting to identify the intakes would ultimately have to look for them in person, so a digital map offers little practical advantage.

I should note that the USGS CD-ROM remains the only Federal document that the U.S. Government Printing Office has instructed libraries to remove for security reasons since the 9/11 terrorist attacks. The Government Printing Office works with agencies to help insure that removals are truly necessary, and in most cases they are not.

Greenwich, Connecticut v. Connecticut Freedom of Information Commission

In June 2005, the Supreme Court of Connecticut ruled that the Geographic Information System database compiled by the City of Greenwich constitutes a public record and had to be released to the public. The city had claimed an exemption based on the data being a trade secret and that disclosure would compromise the security of the information system. It also claimed that public safety could be harmed if criminals or terrorists used the database malevolently. The courts denied those claims, and I found one sentence in the trial judge's opinion especially perceptive: "the requested information was merely a computerized compilation of the town's records that otherwise could be obtained piecemeal from various individual town departments." This addresses, in part at least, the question of how innocuous information may become a security concern when placed in proximity to other information

The primary focus of the Greenwich, CT, case was not national security, but it remains interesting for highlighting how much we depend on large databases which pull together information from many sources. We thrive on the convenience and higher orders of data analysis they can provide. A geographic information system database might contain some information some would consider sensitive, but who gets to decide? And if the taxpayers paid for the creation of a database, on what grounds may they be denied access to it? The Supreme Court of Connecticut set a high standard for allowing an exemption based on public safety: "generalized claims of a possible safety risk do not satisfy the plaintiff's burden of proving the applicability of an exemption from disclosure under the act." The claim of risk must be more definitive than a mere assertion. In other words, just saying so does not make it so.

An article in the Proceedings of the National Academy of Sciences.

The July 12, 2005 issue of the *Proceedings of the National Academy of Sciences* included an article entitled "Analyzing a Bioterror Attack on the Food Supply: The Case of Botulinum Toxin in Milk." The article explored how botulinum toxin introduced at a point early in the supply chain could spread throughout many thousands of gallons as milk from many sources is pooled into massive vats for storage and processing and then dispersed to consumers. All the information in the article derived from public information, including government documents from the U.S. Food and Drug Administration and the Department of Defense.

The editors of the journal had debated whether or not the article should be published and delayed it for a number of weeks. Some government officials argued that the article provided a roadmap for terrorists, but the authors

and editors responded that the information was already public, and exposing vulnerability was the first step toward devising a solution. Others noted that many kinds of contamination--deliberate or not--could affect the safety of the milk supply, and that the public had a right to know about the concerns.

Alberto Gonzales (White House Counsel, now Attorney General) and the "application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban." Or, the Internet as a double-edged sword.

One of my tasks as a librarian is to build a collection at UNO which constitutes a solid, representative sample of official publications which document the history, politics, and life of the United States and Nebraska. I cannot hope to capture everything, but overall we have a strong and useful collection. The era of the Internet has made things especially interesting as many documents are no longer distributed in physical formats like paper or CD-ROM. Everyone loves the convenience of the Internet, but things get dicey when a government agency reorganizes its Web site and documents vanish without a trace. If no tangible document ever existed, then public access may have vanished, too. The UNO Library catalog is now peppered with records which link researchers to Internet-based government documents, whether or not the library actually has a "real" copy. The catalog provides me with a weekly report of broken links; most I can repair, but sometimes the target document has vanished from the Internet.

While the Internet remains a volatile medium for long-term access to government documents, it also makes it easier for the public to read documents that officials may wish had never seen the light of day. This memorandum by Alberto Gonzales documented a White House policy which has proven enormously controversial. The status of "enemy combatants" remains unsettled as cases wind their way through the courts; but this document makes it clear that, in purely legal terms, the White House considers "enemy combatants" beyond the protection of the Geneva Conventions, though President Bush has claimed many times that in actual practice they are treated according to the Geneva Conventions. I don't think anyone should be too surprised that a President keeps his options open.

The Gonzales memo was not officially released to the public with copies distributed through normal channels such as libraries. It was leaked to the press, and I downloaded the file from the MSNBC Web site, printed it, cataloged it, and had it bound. It is a rather notorious document now, and I suspect it will live on the Internet for awhile; however, I wanted a bound

paper copy in the UNO Library for people to refer to 5 years, 10 years, 50 years, 100 years from now. Libraries, especially university libraries, are concerned with more than the needs of today; as much as possible we try to anticipate generations down the road.

How these examples all relate to public access to government information in an era of concern over national security

I could provide more examples, but I think these four when taken together are emblematic of the issues we currently face:

1) Information technology, particularly databases and the Internet, make massive amounts of information more conveniently available. Information which might be innocuous by itself could prove sensitive when combined with other information. If such information lies in the public domain, how do we treat compilations of it?

2) How do we assess risk? The Connecticut Supreme Court looked for a clear, identifiable risk to associate with the Greenwich, CT, Geographic Information System. It determined that a general assertion that the GIS could be misused was not sufficient to block its release.

3) The convenience and speed of current Internet technology make the wide distribution of government information much more efficient, but this does not resolve concerns about what the public may need to know about its government. A number of officials at the White House were much more than irritated that Albert Gonzales' memo made it to the public. However, the memo represents enormously important policy considerations that address how the United States interacts with the world.

In my estimation, the ultimate responsibility for the conduct of our government rests with the governed, and this means that citizens must be informed about what their government does. Let me again refer to the Founders, specifically James Madison, who wrote in 1822, near the end of a long life of thinking about government:

A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives. -- James Madison, Letter to W.T. Berry, August 4, 1822

When thinking about public access to government information related to national security, we should think first in terms of what citizens need to know to be actively engaged with their government. My sense is that the Supreme Court of Connecticut got it right: security threats must be clear and identifiable to merit restrictions on government information. A generalized threat...well, much of life exists in the realm of generalized threats. One could make a pretty good argument that getting out of bed in the morning constitutes an act of faith.

I suspect some of you have seen T-shirts or bumper stickers saying that "Freedom is not Free." That statement is true on at least two levels. I suspect that the person wearing the T-shirt is thinking about the sacrifices made by those who serve in our Armed Forces; but the cost of freedom also encompasses citizens actually living the values we claim to hold so dear. We need to remember that the rights, privileges, and even obligations we enjoy as American citizens were purchased in blood, and we should never surrender them easily or without enormous justification.

I believe that over the long haul, our country's best and most persuasive defense against tyranny of any sort rests with a citizenry which is engaged with the government and demands justification and accountability. Truly, living as a free people is hard work and carries inevitable risk; but a look around at the rest of the world does not turn up many attractive alternatives.

When you walk up the stairs to the north entrance of the Nebraska State Capitol building, you can see above the door an inscription which reads:

The salvation of the state is watchfulness in the citizen.

The citizen's watchfulness depends very much on her ability to know what the government is doing, so access to government information--whether via the Internet, via libraries, by inquiring at government offices, however--must be readily available. Even when our nation is at war, we should think first in terms of making as much government information available as possible before we look toward placing restrictions on a citizen's access.

Thank you for your attention today, and I will be happy to respond to questions.